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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. _____

PAUL WILLIAM JORDAN,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

The Petitioner, Paul William Jordan, through counsel, respectfully requests that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of the State of Arizona entered in this proceeding on June 19, 1980.

OPINION OF THE COURT BELOW

The opinion of the Supreme Court of the State of Arizona in this proceeding affirming Petitioner's resentence to death has been reported. State v. Jordan, ___ Ariz. ___, ___ P.2d ___ (1980). A copy of the opinion has been appended to this petition as Appendix A. The order of this Court vacating the first death penalty imposed upon Petitioner can be found in Jordan v. Arizona, 438 U.S. 911, 98 S.Ct. 3138, 57 L.Ed.2d 1157 (1978). The first death penalty vacated by this Court was affirmed by the Arizona Supreme Court in State v. Jordan, 114 Ariz. 452, 561 P.2d 1224 (1976).

JURISDICTION

The judgment of the Supreme Court of the State of Arizona affirming the order of the Maricopa County Superior Court resentencing the Petitioner to death was entered on June 19, 1980. See Appendix A. This Petition is timely filed

pursuant to Rule 22(1), Rules of the Supreme Court. This Court has jurisdiction pursuant to 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

I. The courts of the State of Arizona violated the mandate of this Court by resentencing Paul Jordan to death after this Court had vacated his death sentence because Arizona's death penalty statute was unconstitutional.

II. The re-drafting of the Arizona death penalty statute by the Arizona Supreme Court to cure constitutional infirmities and the application of the statute as re-drafted by Arizona courts to persons previously sentenced to death by the unconstitutuional statute was illegal.

A. It was constitutionally improper for the Arizona Supreme Court to re-draft the Arizona death penalty statute because the mitigation section of the unconstitutional statute was not severable from the remainder of the statute.

B. Application of the death penalty statute re-drafted by the Arizona Supreme Court to the Petitioner who had previously been sentenced to death using the unconstitutional statute violated the Double Jeopardy Clause of the Fifth Amendment.

C. Application of the death penalty statute re-drafted by the Arizona Supreme Court in July of 1978 to the Petitioner who was accused of a homicide which occurred on January 15, 1974, violated the Ex Post Facto Clause.

D. Application of the court-drafted death penalty statute to the Petitioner violated the principles of fundamental fairness embodied in the Due Process Clauses of the Fifth and Fourteenth Amendments.

E. The court-drafted death penalty statute violates the prohibition against judicially created penalties contained in the Eighth and Fourteenth Amendments.

III. The death penalty statute created by the Arizona Supreme Court and applied to the Petitioner is unconstitutional.

A. The death penalty is cruel and unusual punishment in violation of the Eighth Amendment.

B. The death penalty created by the Arizona Supreme Court violates due process because it is vague and has led to the arbitrary infliction of the death penalty.

C. The death penalty statute improperly allocates the burden of proof upon the defendant for mitigating circumstances which violates the Due Process Clauses of the Fifth and Fourteenth Amendments.

IV. The Petitioner may not validly be sentenced to death because his conviction is based upon a felony-murder theory.

CONSTITUTIONAL PROVISIONS

Article I, Section 10, Constitution of the United States:

"No State shall . . . pass any . . . ex post facto Law . . . ."

Article VI, Constitution of the United States:

"This Constitution, . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Law of any State to the Contrary notwithstanding."

Amendment V, Constitution of the United States:

"[N] or shall any person be subject for the same offence to be twice put in jeopardy of life or limb; . . . nor be deprived of life, liberty or property, without due process of law . . . ."

Amendment VIII, Constitution of the United States:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Amendment XIV, Constitution of the United States:

". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTES

Arizona Revised Statutes, §1-246:

1-246. Penalty altered by subsequent law; effect

When the penalty for an offense is prescribed by one law and altered by a subsequent law, the penalty of such second law shall not be inflicted for a breach of the law committed before the second took effect, but the offender shall be punished under the law in force when the offense was committed.

Section 5, Chapter 138, Thirty-First Arizona Legislature, First Regular Session, Arizona Revised Statutes, §13-454 (Renumbered A.R.S. §13-703 and modified effective October 1, 1978, modified effective May 1, 1979):

13-454. Proceedings for determining sentence upon the finding or admitting of guilt in cases of murder in the first degree

A. When a defendant is found guilty of or pleads guilty to first degree murder, the judge who presided at the trial or before whom the guilty plea was entered shall conduct a separate sentencing hearing to determine the existence or nonexistence of the circumstances set forth in subsection E and F, for the purpose of determining the sentence to be imposed. The hearing shall be conducted before the court alone.

B. In the sentencing hearing the court shall disclose to the defendant or his counsel all material contained in any presentence report, if one has been prepared, except such material as the court determines is required to be withheld for the protection of human life. Any presentence information withheld from the defendant shall not be considered in determining the existence or nonexistence of the circumstances set forth in subsection E or F, any information relevant to any of the mitigating circumstances set forth in subsection F may be presented by either the prosecution or the defendant, regardless of its admissibility under the rules governing admission of evidence at criminal trials; but the admissibility of information relevant to any of the aggravating circumstances set forth in subsection E shall be governed by the rules governing the admission of evidence at criminal trials. Evidence admitted at the trial, relating to such aggravating or mitigating circumstances, shall be considered without reintroducing it at the sentencing proceeding. The prosecution and the defendant shall be permitted to rebut any information received at the hearing, and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any of the circumstances set forth in subsections E and F. The burden of establishing the existence of any of the circumstances set forth in subsection E is on the prosecution. The burden of establishing the existence of the circumstances set forth in subsection F is on the defendant.

C. The court shall return a special verdict setting forth its findings as to the existence or nonexistence of each of the circumstances set forth in subsection E and as to the existence or nonexistence of each of the circumstances in subsection F.

D. In determining whether to impose a sentence of death or life imprisonment without possibility of parole until the defendant has served twenty-five calendar years, the court shall take into account the aggravating and mitigating circumstances enumerated in subsections E and F and shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in subsection E and that there are no mitigating circumstances sufficiently substantial to call for leniency.

E. Aggravating circumstances to be considered shall be the following:

1. The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was impossible.

2. The defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person.

3. In the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the victim of the offense.

4. The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.

5. The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.

6. The defendant committed the offense in an especially heinous, cruel, or depraved manner.

F. Mitigating circumstances shall be the following

1. His capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution.

2. He was under unusual and substantial duress, although not such duress as to constitute a defense to prosecution.

3. He was a principal, under section 13-452, Arizona Revised Statutes, in the offense, which was committed by another, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution.

4. He could not reasonably have foreseen that his conduct in the course of the commission of the offense for which he was convicted would cause, or would create a grave risk of causing, death to another person.

Section 10, Chapter 138, Thirty-First Arizona Legislature, First Regular Session: Severability of sentence clause

In the event the death penalty is held to be unconstitutional on final appeal, a person convicted of first degree murder or another offense punishable by death who has been sentenced to die shall be resentenced by the sentencing court to life imprisonment without possibility of parole until the person has served a minimum of twenty-five calendar years.

STATEMENT OF THE CASE

The Petitioner, Paul William Jordan, was convicted in the Maricopa County Superior Court for an alleged homicide which took place on January 15, 1974. He was first sentenced to death on March 13, 1975. At that time, the only aggravating circumstances alleged by the state were "prior" convictions which occurred on March 7, June 4, and October 9, 1974 in the State of Texas after the homicide for which he was convicted. A.R.S. §13-454 (re-numbered §13-703 and modified effective October 1, 1978; subsequently modified effective May 1, 1979). Jordan's conviction and sentence were affirmed by the Arizona Supreme Court on March 30, 1976. State v. Jordan, 114 Ariz. 452, 561 P.2d 1224 (1976).

When this Court struck down the existing state death penalties in 1972, it entered orders in pending Arizona cases which read in pertinent part:

> "Judgment vacated insofar as it leaves undisturbed the death penalty imposed, and case remanded . . . for further proceedings." See, e.g., Kruchten v. Eyman, 408 U.S. 934, 92 S.Ct. 2853, 33 L.Ed.2d 748 (1972).

This Court's order referred to Stewart v. Massachusetts, 408 U.S. 845, 92 S.Ct. 2845, 33 L.Ed.2d 744 (1972) which in turn cited Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2727, 33 L.Ed.2d 346 (1972).

The response of the Arizona Supreme Court, as well as every other state Supreme Court that considered the issue, was to commute the sentences of all persons then on death row to life in prison. See, e.g., State v. Endreson, 109 Ariz. 117, 506 P.2d 248 (1973); State v. Schmid, 109 Ariz. 349, 509 P.2d 619 (1973).

The Thirty-First Arizona Legislature during its first regular session passed a new death penalty. A.R.S. §13-454 (re-numbered §13-703 effective October 1, 1978 and modified; subsequently modified effective May 1, 1979). The bill which eventually became law was Senate Bill 1005. When that bill was passed by the

Arizona House, it included a provision which stated:

> "Evidence may be presented as to any matter the Sentencing Panel deems relevant to sentencing, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in sections b and c of this section." Journal of the House, Thirty-First Legislature, First Regular Session, p. 499. (Emphasis added).

That language was not enacted. Instead, the Senate version was passed which significantly restricted the number of mitigating circumstances that could be considered. As it was, the bill passed the Senate by only seventeen to twelve and received ten no votes and eight abstentions in the House. Journal of the Senate, Thirty-First Arizona Legislature, First Regular Session, p. 726. There could be no clearer statement of the Arizona Legislature's intent that mitigating circumstances be restricted.

There also can be no question about the legislative intent concerning what was to be done should a part of the statute be found unconstitutional. Section 10 of Senate Bill 1005 states unambiguously that persons sentenced to death shall be re-sentenced by the sentencing court to life imprisonment if the death penalty is held to be unconstitutional. Section 10, Chapter 138, Thirty-First Arizona Legislature, First Regular Session.

In construing this statute before it was found unconstitutional by this Court, the Arizona Supreme Court was scrupulous in its construction. In case after case, the court held that the trial judge who made the decision whether to invoke the death penalty was limited to considering "only those aggravating and mitigating factors listed in the statute. A.R.S. §13-454(D)." State v. Bishop, 118 Ariz. 263, 576 P.2d 122, 128 n. 4 (1978). The United States District Court for the District of Arizona, anticipating the action of this Court, declared the Arizona death penalty unconstitutional because it restricted mitigation. Richmond v. Cardwell, 450 F.Supp. 519 (D.Az. 1978).

A few months later, this Court decided Lockett v. Ohio, 438 U.S. 586 98 S.Ct. 2254, 57 L.Ed.2d 973 (1978) and Bell v. Ohio, 438 U.S. 637, 98 S.Ct. 2977, 57 L.Ed.2d 1010 (1978). On the same day, this Court granted the pending petition for writ of certiorari of Petitioner and entered its standard order similar to the Kruchten order:

> "Judgment vacated insofar as it leaves undisturbed the death penalty imposed, and case remanded to the Supreme

> Court of Arizona for further proceedings." Jordan v. Arizona, 438 U.S. 911, 98 S.Ct. 3138, 57 L.Ed.2d 1157 (1978).

The order cited Lockett v. Ohio, supra, which invalidated the Ohio death penalty because it impermissibly restricted mitigation. 98 S.Ct. at 2965.

A few weeks later, the Supreme Court of the State of Arizona responded in State v. Watson, 120 Ariz. 441, 586 P.2d 1253 (1978). The Arizona Supreme Court was forced to hold:

> ". . . that A.R.S. §13-454(F), insofar as it limits the right of the defendant to show additional mitigating circumstances, is unconstitutional." 586 P.2d at 1257.

Although the question of severability had not been briefed or argued in the Watson case, the Arizona Supreme Court went on to consider whether the unconstitutional portions of the death penalty statute were severable:

> ". . . so that the constitutional portion of the statute can remain in force and effect." 586 P.2d at 1257.

After opining that severability was solely a question of legislative intent, the Arizona Supreme Court reached a startling conclusion:

> "We can presume that had the Legislature been aware of the unconstitutionality of the limitation on mitigating circumstances, they would have enacted the remainder of the statute without what is now the offending portion. We hold that the statute with the portion deleted remains in force and effect." 586 P.2d at 1257.

The Watson case was remanded for resentencing and the trial court was ordered to allow the defendant at resentencing:

> ". . . to present any mitigating circumstances tending to show why the death penalty should not be imposed." 586 P.2d at 1257.

[Prior to Watson the Arizona Legislature renumbered the death penalty statute as A.R.S. §13-703 as a part of a general revision of Arizona's criminal code and added one mitigating factor: "The defendant's age. " The renumbering and modification were effective October 1, 1978. After Watson the Arizona Legislature passed a modification of the death penalty statute which attempted to follow the guidelines on mitigation set forth in Watson. The modification was effective May 1, 1979. A.R.S. §1-246.]

On September 7, 1978, the Arizona Supreme Court entered an order remanding the Petitioner's case to the trial court for resentencing pursuant to the Watson decision. A new mitigation hearing was held on December 15, 1978.

At the new pre-sentencing hearing, the prosecution presented no new evidence in aggravation. However, the defense presented significant new

evidence in mitigation made admissible by the Watson re-drafting of Arizona's death penalty statute. Three additional mitigating factors were alleged and proven by the defense: (1) the extent of the defendant's cooperation with the police, Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 2936, 49 L.Ed.2d 859 (1976); (2) the lack of specific intent by the Petitioner to cause death, Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2254, 2961, 57 L.Ed.2d 973 (1978); and (3) the influence of alcohol or drugs upon Petitioner at the time of the offense. Roberts v. Louisiana, 431 U.S. 633, 97 S.Ct. 1993, 1995, 52 L.Ed.2d 637 (1977).

The uncontradicted evidence showed that Jordan cooperated with the police by giving them a full and complete confession which solved a crime that they otherwise would have been unable to solve. Exhibit 1, Mitigation Hearing of December 15, 1978. His cooperation extended to waiving extradition and allowing an executive agreement to be made providing for his transfer between the states of Texas and Arizona. Exhibit 7, Mitigation Hearing of December 15, 1978. The facts of the case demonstrated that there was no specific intent to cause death. The jury was given a felony-murder instruction, so there is no jury verdict that would support a finding of specific intent. The decedent was killed with one shot. The only evidence supports the conclusion that the homicide occurred unexpectedly during the course of a robbery.

The defense presented significant, new testimony establishing that Jordan was heavily under the influence of alcohol and drugs at the time the homicide occurred. The woman with whom he was travelling at the time of the homicide, Nancy Willifred, testified that he was routinely drunk and under the influence of drugs during the time period surrounding the alleged offense. Reporter's Transcript of December 15, 1978, hereinafter referred to as RT, p. 15). She saw the Petitioner every day during the months leading up to and including the incident in question. It was Jordan's custom to drink at least two bottles of wine per day and to take two or three downers. He started drinking about noon and by evening was "drunk and goofy". (RT p. 12.) While in Phoenix, Jordan was under the influence of alcohol and drugs every day by suppertime. (RT, p. 15) When she last saw him before the alleged homicide occurred, between 4:00 and 5:00 o'clock on the afternoon of January 15, 1974, Jordan had been drinking and taking pills and was mumbling drunk. (RT, pp. 29-30). The homicide occurred a short time later. This new evidence in mitigation was absolutely unrebutted by the prosecution.

Nevertheless, the same trial judge, who had initially sentenced the Petitioner to death, re-sentenced him to death on December 28, 1978. The special verdict entered by the trial judge found the original two aggravating factors and two other aggravating factors that had not been found at the time of the first sentencing, even though no new aggravating evidence had been presented. The sentencing judge refused to find any mitigating factors. The Supreme Court of the State of Arizona affirmed the re-imposition of the death penalty, but found it unnecessary to consider the application of the two new aggravating circumstances. It expressly affirmed the use of the "prior" convictions which occurred after the homicide as aggravating factors. Appendix A. The Arizona Supreme Court also refused to give any weight to the mitigating evidence presented. Appendix A.

During the time that the re-sentencing has been pending, a class action was brought on behalf of the inmates of Arizona's death row, including the Petitioner, challenging the legality of the revision of the Arizona death penalty statute by the Arizona Supreme Court and its application both prospectively and retrospectively. The action was initiated in federal court after the United States District Court for the District of Arizona found Arizona death penalty statute unconstitutional in a decision which anticipated this Court's decision in Lockett and Bell. See, Richmond v. Cardwell, 450 F.Supp. 519 (D. Az. 1978). However, the federal District Court reversed itself after Watson. Knapp v. Cardwell, ___ F.Supp. ___ (District Arizona 1980). The Knapp decision is presently on appeal in the Court of Appeals for the Ninth Circuit. Knapp v. Cardwell, 9th Circuit No. 80-5419. Further consideration of that appeal in the Ninth Circuit is presently stayed pending resolution of motions brought by the Attorney General of the State of Arizona to preclude Public Defenders (including undersigned counsel), from representing their clients in federal court.

REASONS FOR GRANTING THIS PETITION

I. THE RESENTENCING OF PETITIONER TO DEATH VIOLATES THE MANDATE OF THIS COURT WHICH VACATED PETITIONER'S DEATH SENTENCE.

The United States Supreme Court has plenary power to determine whether its prior decisions have been scrupulously and fully carried out. United States v.

F. I. du Pont De Nemours and Co., 366 U.S. 316, 325, 81 S.Ct. 1243, 6 L.Ed.2d 318 (1961).

The order of this Court in Petitioner's case which vacated the judgment "insofar as it leaves undisturbed the death penalty imposed" did not authorize the courts of Arizona to resentence Petitioner to death. The courts of the State of Ohio recognized this in the Lockett and Bell cases which were decided by this Court on the same date and for the same reason. See, e.g., State v. Scott, 61 Ohio St.2d 155, 400 N.E.2d 375, 378 n. 4 (1980).

The Arizona Supreme Court has made a decision of momentous import in construing this Court's mandate to allow Petitioner's resentence to death. Note, Evasion of Supreme Court Mandates in Cases Remanded to State Courts Since 1941, 67 Harv. L.R. 1251 (1954); Note, State Court Evasion of United States Supreme Court Mandates, 56 Yale L.J. 574 (1947).

Although a few states have attempted to stretch this Court's opinion in Dobbert v. Florida, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 334 (1977) into a justification for resentencing persons to death who had previously been sentenced to death using an unconstitutional statute (see part II below), counsel has been able to find no case in which this Court "vacated the judgment insofar as it leaves undisturbed the death penalty imposed" where the state courts were thereafter allowed to resentence the petitioner to death.

Uniformity of adherence to the mandates of this Court should be an essential concern of this Court. See, Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 4 L.Ed. 97 (1816). Justice Story's observations upon the principal of federal supremacy over state court interpretations of federal law has equal validity when applied to state court interpretations of this Court's mandates:

> "The Constitution has presumed (whether rightly or wrongly, we do not inquire), that state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice." 14 U.S. at 346-7.

Justice Story also considered essential:

> ". . . the importance, and even necessity of uniformity of decisions throughout the whole of the United States, upon all subjects within the purview of the Constitution." 14 U.S. at 347-8.

The response of the Arizona Supreme Court to the mandate of this Court in Jordan v. Arizona, supra, was inconsistent with the response of every other state

court, including Arizona, to orders using the same language in every other case where the death penalty was vacated because of an unconstitutional statute in the recorded history of this country. Fidelity to the principal of supremacy cannot allow this aberration to stand. Article VI, Constitution of the United States.

II. THERE IS A DRAMATIC CONFLICT BETWEEN THE STATES OVER THE QUESTION OF THE APPLICATION OF THIS COURT'S OPINION IN DOBBERT V. FLORIDA TO DEATH PENALTY CASES.

A small minority of jurisdictions have joined with Arizona and authorized the resentencing to death of persons previously sentenced to death using unconstitutional statutes. State v. Watson, 120 Ariz. 441, 586 P.2d 1253 (1978); Smith v. Commonwealth, 219 Va. 455, 248 S.E.2d 135 (1978) (However, the Virginia Supreme Court did not legislate the new death penalty statute.); State v. Coleman, 605 P.2d 1000 (Mont. 1979) (The Montana Supreme Court did not legislate a new death penalty statute.); Jackson v. State, 337 So.2d 1242 (Miss. 1976) (Jackson is a unique case. In it, the Mississippi Supreme Court re-wrote Mississippi's death penalty statute because it was obviously unconstitutional and then vacated the death sentences and convictions of all persons previously sentenced to death under the unconstitutional statute. The opinion of the court left open the possibility of resentence to death.)

Every other state that has considered the issue with regard to statutes passed after Furman has concluded that persons sentenced to death using an unconstitutional statute cannot be resentenced to death using a statute which has been modified to allegedly pass constitutional muster. People v. Teron, 23 Cal.3d 103, 588 P.2d 773, 151 Cal.Rptr. 663 (1979); People v. Harvey, 76 Cal.App.3d 441, 142 Cal.Rptr. 887 (2d Dist. 1978); People v. Payne, 75 Cal.App.3d 601, 142 Cal.Rptr. 320 (1st Dist. 1977); Rockwell v. Superior Court, 18 Cal.3d 420, 556 P.2d 1101, 134 Cal.Rptr. 650 (1976); State v. Spence, 367 A.2d 983 (Del. 1976); State v. Lindquist, 99 Idaho 766, 589 P.2d 101 (1979); People ex rel. Rice v. Cunningham, 336 N.E.2d 1 (Ill. 1975); People v. Hill, 78 Ill.2d 465, 401 N.E.2d 517 (1980); French v. State, 362 N.E.2d 834 (Ind. 1977); Bond v. State, 403 N.E.2d 812 (Ind. 1980); Boyd v. Commonwealth, 550 S.W.2d 507 (Ky. 1977); Hudson v. Commonwealth, Kentucky Supreme Court No. 78 SC 563 (April 1, 1980); State v. Jenkins, 340 So.2d 157 (La. 1976); State v. Collins, 370 So.2d 533 (La. 1979); Blacksell v. State, 278 Md. 466, 365 A.2d 545 (1976); Commonwealth v. O'Neal, 339 N.E.2d 676 (Mass. 1975); State

v. Duren, 547 S.W.2d 476 (So. 1977); Meller v. State, 581 P.2d 3 (Nev. 1978); State v. Noble, 90 N.M. 360, 563 P.2d 1153 (1977); State v. Collins, Court of Appeals, First Appellate District of Ohio (March 7, 1979); Riggs v. Branch, 554 P.2d 823 (Okla. Cr. 1976); Commonwealth v. Moody, 476 Pa. 223, 382 A.2d 442 (1977); State v. Cline, 397 A.2d 1309 (R.I. 1979); State v. Rodgers, 242 S.E.2d 215 (S.C. 1978); Miller v. State, 584 S.W.2d 758 (Tenn. 1979); State v. Forrester, 21 Wash.App. 855, 587 P.2d 179 (1978); Kennedy v. State, 559 P.2d 1014 (Wyo. 1977).

Many of the states which have refused to allow the resentencing of death row inmates have done so on the basis of state statutory or constitutional provisions because of an incorrect belief that this Court's opinion in Dobbert v. Florida, supra, can be extended to the facts of these cases to eliminate any ex post facto or double jeopardy obstacles erected by the Constitution of the United States. See, e.g., Miller v. State, 584 S.W.2d at 760 (Arizona has similar constitutional and statutory provisions which were ignored by the Arizona Supreme Court. A.R.S. §1-246 and Art. 2, §25, Ariz. Const.) This reading of Dobbert ignores the fact that Dobbert was not tried, convicted or sentenced using an unconstitutional statute. Other courts have correctly observed that Dobbert by implication precludes the application of the death penalty to Petitioner and all persons similarly situated. See, e.g., State v. Lindquist, 589 P.2d at 104; State v. Rodgers, 242 S.E.2d at 217-218.

Ironically, the Dobbert decision has been legitimately criticized because it fails to provide a workable standard for the fair warning test and does not protect against improperly motivated legislation. Comment, 9 Texas Tech Law Review 145, 157 (1977). See also, criticism of Dobbert contained in People v. Stewart, 61 Ill.App.3d 111, 377 N.E.2d 1112 (1978); State v. Young, 77 N.C. 245, 390 A.2d 556 (1978); State v. Moyer, 387 A.2d 194 (Del. 1978); Miller v. State, 584 S.W.2d 758 (Tenn. 1979). The ex post facto and double jeopardy implications of the extension of Dobbert v. Florida, to the Petitioner's case are significant and extend not just to nearly twenty persons similarly situated in Arizona, but persons similarly situated in Montana, Virginia and Mississippi. Only this Court can authoritatively deal with the dramatic division of opinion concerning Dobbert and with the even more significant division between the states over the proper procedure to be followed with persons previously sentenced to death under an unconstitutional statute.

III. THE DECISION TO RESENTENCE PETITIONER TO DEATH CONFLICTS WITH THE PRIOR DECISIONS OF THIS COURT ON SEVERAL THEORIES.

A. Ex Post Facto and Due Process.

The resentencing of Petitioner to death using a statute modified to pass constitutional muster years after his first sentence grossly conflicts with the prior decisions of this Court concerning the Ex Post Facto Clause and due process. Article I, Section 10 and Fourteenth Amendment, Constitution of the United States. Sentencing under a statute passed after the date of the offense has been held to be an ex post facto violation even if the sentence received under the new statute could also have been received under the old statute. Lindsey v. Washington, 301 U.S. 397, 401, 57 S.Ct. 397, 81 L.Ed. 1182 (1937). In addition, judicial enlargement of a criminal statute after the crime has been committed to the disadvantage of the defendant or construction by a court of a statute in an unexpectedly broad manner are due process violations. Marks v. United States, 430 U.S. 188, 191-192, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977); Bouie v. City of Columbia, 378 U.S. 347, 353, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964). It would be an understatement to say that the promulgation of a new death penalty statute by the Arizona Supreme Court was a "judicial enlargement" or reconstruction that was "unexpectedly broad". Accord, Hicks v. Oklahoma, ___ U.S. ___, 100 S.Ct. 2227, ___ L.Ed.2d ___ (1980) (holding that sentencing under an unconstitutional statute was improper even though the sentence received was within the limits allowed by general sentencing statute which should have been used. General sentencing provision applicable in this case was life imprisonment. Section 10, Chapter 138, Thirty-First Arizona Legislature, First Regular Session.)

B. Double Jeopardy.

The resentencing of the Petitioner to death also violates the double jeopardy clause. Fifth Amendment, Constitution of the United States. The double jeopardy clause is, of course, applicable to the states because of the Fourteenth Amendment. Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969). The Double Jeopardy Clause precludes the enhancement of punishment after a sentence, legal at the time it is announced, has been entered. Ex Parte Lange, 85 U.S. (18 Wall.) (1874). As indicated above, when the Arizona death penalty statute was found to be unconstitutional, the only appropriate sentence provided for by the Arizona Legislature was life imprisonment. Section 10,

14.

Chapter 138, Thirty-First Arizona Legislature, First Regular Session. Exposing the Petitioner again to the death penalty forced him to "run the gauntlet" a second time. Abney v. United States, 431 U.S. 651, 662, 97 S.Ct. 2054, 52 L.Ed.2d 651 (1977). When a death sentence has been imposed under an unconstitutional statute, jeopardy attaches and the person may not subsequently be sentenced to death. Dobbert v. Florida, 97 S.Ct. at 2300.

IV. THE ACTION OF THE ARIZONA SUPREME COURT IN RE-DRAFTING THE PREVIOUSLY UNCONSTITUTIONAL ARIZONA DEATH PENALTY STATUTE TO MAKE IT CONSTITUTIONAL IS INCONSISTENT WITH THE PRIOR DECISIONS OF THIS COURT AND WITH THE DECISIONS OF OTHER STATE COURTS.

There can be no serious question but that the Arizona Supreme Court, the Federal District Court and this Court found Arizona's death penalty statute which was in effect at the time Petitioner was sentenced to be unconstitutional. State v. Watson, 586 P.2d at 1257; State v. Carriger, 123 Ariz. 335, 599 P.2d 788, 793 (1979); Richmond v. Cardwell, 450 F.Supp. 519 (D.Az. 1978); Jordan v. Arizona, supra. (But see, Knapp v. Cardwell, ___ F.Supp. ___ (D.Az. 1980) allowing the Arizona Supreme Court to "re-interpret" its death penalty statute. Knapp is presently on appeal to the Ninth Circuit Court of Appeals. The appeal has been indefinitely stayed pending resolution in state court of challenges by the State of Arizona to the representation of Petitioner and other death row inmates by Public Defenders in federal court.) Without the aid of briefing or argument on the point, the Arizona Supreme Court attempted in Watson to sever the unconstitutional limitation on mitigation in the Arizona death penalty statute in Watson and add a provision to the statute allowing anything to be introduced in the way of mitigation. 586 P.2d at 1257.

The action of the Arizona Supreme Court in Watson was not severance. As Justice Brandeis has noted, severability presents two questions: (1) whether the statute minus the offending language can stand alone, and (2) whether the state legislature intended that the unobjectionable portion of the statute be able to stand alone if the remainder of the statute were struck down. Dorchy v. State of Kansas, 264 U.S. 286, 291, 44 S.Ct. 323, 68 L.Ed. 686 (1924). The Arizona Supreme Court's bald-faced assertion that the Arizona Legislature intended to pass a constitutional statute and, therefore, intended that the Arizona death penalty statute be severable, that is, that the mitigating factors section be severable from

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the remainder of the statute, is clearly erroneous. It should be noted that the Arizona Supreme Court did not even mention in its original Watson opinion the provision passed by the Arizona Legislature with the original version of A.R.S. §13-454 that stated unambiguously that persons sentenced to death shall be resentenced by the sentencing court to life imprisonment if the death penalty is held to be unconstitutional. Section 10, Chapter 138, Thirty-First Arizona Legislature, First Regular Session.

In addition to the incredible "finding" of legislative intent to allow severability, the action of the Arizona Supreme Court in deleting the mitigation section (subsection F) and the references to subsection F throughout the remainder of the statute make the death penalty statute completely unintelligible. There is no severance, where the remainder of the statute cannot stand alone. Dorchy v. State of Kansas, supra.

This Court established sound precedent in refusing to re-draft death penalty statutes which have been held unconstitutional. United States v. Jackson, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968). Accord, United States v. Narciso, 446 F.Supp. 252 (E.D. Mich. 1977). Arizona case authority prior to Watson is in accord with the federal authority on this point. See, e.g., Eastin v. Broomfield, 116 Ariz. 576, 570 P.2d 744 (1977); State ex rel. Berger v. Superior Court, 106 Ariz. 365, 476 P.2d 666 (1970). Every state court that has been invited to re-draft a state death penalty to make it constitutional has declined except for Arizona and Mississippi. See, e.g., Rockwell v. Superior Court, 18 Cal.3d 420, 556 P.2d 1101, 134 Cal.Rptr. 650 (1976); State v. Lindquist, 99 Idaho 766, 589 P.2d 101 (1979); French v. State, 362 N.E.2d 834 (Ind. 1977); Bond v. State, 403 N.E.2d 812 (Ind. 1980); Riggs v. Branch, 554 P.2d 823 (Okla. Cr. 1976); State v. Cline, 397 A.2d 1309 (R.I. 1979); Kennedy v. State, 559 P.2d 1014 (Wyom 1977). But see, State v. Watson, supra; Jackson v. State, 337 So.2d 1242 (Miss. 1976). Only this Court can resolve the tremendous conflict between the states over the ability of a state court to legislate a death penalty and apply it retrospectively and prospectively.

The Eighth Amendment to the United States Constitution prohibits cruel and unusual punishment. It is made applicable to the states by the Fourteenth Amendment. Coker v. Georgia, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977).

Historical analysis reveals that the framers of the Constitution borrowed the cruel and unusual punishment proscription from the Tenth Clause of the

English Bill of Rights of 1689. This Clause was in large part directed against the "punishments unauthorized by statute and beyond the jurisdiction of the sentencing court". Gregg v. Georgia, 428 U.S. 153, 169, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). See also, 5 Blackstone, Commentaries on the Laws of England, pp. 377-379 (Tucker ed. 1803).

The imposition of penalties not authorized by statutes is so abhorrent that this Court has for over a century considered it to violate the Due Process Clause in addition to the Eighth Amendment. Ex Parte Lange, 83 U.S. (18 Wall.) 163 (1874).

Article IV, Section 4 of the United States Constitution guarantees to the citizens of every state a republican form of state government. The republican form of government envisioned by the founding fathers is a government of separate, co-equal branches. Separation of powers means that judges "can exercise no executive prerogative . . . nor any legislative function . . . ." J. Madison, The Federalist Papers, No. 47, pp. 301, 303, Mentor Book (1961). Madison relied upon Montesquieu's theory of a republican form of government in defending the Guarantee Clause of the Constitution. Montesquieu is unequivocal on the subject of judicial exercise of legislative power:

> "[T]here is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator." Montesquieu, The Spirit of the Laws, Book XI, p. 152, Hafner Publishing Company (1966).

Although this Court has recently observed that the doctrine of separation of powers embodied in the federal constitution is not mandatory on the states, it has indicated that the Due Process Clause of the Fourteenth Amendment "presumably prohibits state courts from depriving persons of liberty or property as punishment for criminal conduct except to the extent authorized by state law." Whalen v. United States, ___ U.S. ___, 100 S.Ct. 1432, 1436-1437 n. 4, ___ L.Ed.2d ___ (1980).

Only this Court can insure that citizens of the State of Arizona will not fall prey to legislative action by the Arizona Supreme Court which has the effect of depriving the Petitioner of his life.

V. APPLICATION OF THE DEATH PENALTY TO PETITIONER IS CONTRARY TO THE PAST DECISIONS OF THIS COURT.

A. Felony-Murder Instruction.

Petitioner's conviction is based upon a felony-murder instruction. Both Justice White and Justice Blackmun, in their concurring opinions in Lockett v. Ohio, supra, indicate that a first degree murder conviction based upon implied malice or vicarious liability would "skirt the limits of the Eighth Amendment proscription, incorporated into the Fourteenth Amendment, against gross disproportionality . . . ." 98 S.Ct. at 2969, 2983-85. Although the remainder of this Court found it unecessary to discuss this issue in resolving Lockett, the reasoning of Justice Blackmun and White is compelling. The death penalty should be exacted only where the state has proven beyond a reasonable doubt that the defendant had the highest form of criminal intent, the premeditated intent to kill with malice. The prosecution did not prove that mental state in Petitioner's case, but rather relied upon a felony-murder instruction to infer the mental element necessary to obtain a conviction for first degree murder. Therefore, the Petitioner's conviction should either be vacated or the state should be precluded from imposing the death penalty.

B. Ex Post Facto Use Of "Prior" Convictions.

Use of the "prior" convictions to invoke the death penalty violates the Ex Post Facto Clause and Due Process Clause of the Fourteenth Amendment of the United States Constitution. Cf. Cozzolino v. State, 584 S.W.2d 165 (Tenn. 1979). At the time of the homicide for which Petitioner was convicted, he had no prior convictions which could have been used to enhance the punishment in his case to death. After the homicide he was taken to Texas before Arizona. While in Texas, he incurred convictions which were later used to enhance punishment in Arizona. Had he been taken to Arizona and tried on the murder first in Arizona, the death penalty could not have been invoked.

Whether or not the death penalty is invoked should not depend upon the purely arbitrary question of which state a defendant is taken to when he is wanted in more than one state. To allow the death penalty to be imposed on such a irrelevant occurrence compels the conclusion that the death penalty, as inflicted in this case, was arbitrary and freakish in application. Furman v. Georgia, supra.

C. Refusal To Consider Mitigation.

The refusal of the Arizona courts to consider the mitigating evidence presented by the defense in mitigation of Petitioner's sentence shows first that the Watson opinion is a fraud meant solely to pass federal court review without changing the reality of application in Arizona and second that the application of the death penalty in Arizona is arbitrary and freakish. No person like Petitioner who was sentenced to death before Watson whose sentence had been approved by the Arizona Supreme Court before Watson has had that death penalty reduced by the Arizona Supreme Court after Watson.

The Arizona Supreme Court has reduced the death penalty for a defendant who shot his wife in the back of the head with a .30-06 caliber rifle for insurance money (State v. Madsen, ___ Ariz. ___, 609 P.2d 1046 (1980)) and it has reduced the death penalty for a drug pusher with a prior conviction who brutally executed someone during a drug ripoff (State v. Brookover, 124 Ariz. 38, 601 P.2d 1322 (1980)). Both of those cases involved defendants who were sentenced for the first time after Watson. The Petitioner is charged with having shot a man once during a robbery. There is no evidence to rebut his statement that he did not intend to kill the decedent, but fired thinking that the decedent was reaching for a gun. Gregg v. Georgia, 96 S.Ct. at 2936. He cooperated with the police by giving them a full confession which solved a crime that they might not otherwise have been able to close. Lockett v. Ohio, 98 S.Ct. at 2961. There is also unrebutted testimony that he was intoxicated at the time of the offense. Roberts v. Louisiana, 97 S.Ct. at 1995. This mitigation far exceeds that contained in Madsen or Brookover. The aggravating factors in Petitioner's case are technical and arbitrarily applied to Petitioner.

Under the circumstances, the imposition of the death penalty upon Petitioner is arbitrary and freakish. Furman v. Georgia, supra.

CONCLUSION

For the reasons stated above, Petitioner requests that this Court issue a Writ of Certiorari to the Supreme Court of the State of Arizona in this case.

Respectfully submitted this 12 day of September, 1980.

John Foreman

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Attorney for Petitioner
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19.

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF ARIZONA
In Banc

STATE OF ARIZONA, Appellee,	)	
v.	)	No. 3156-2
PAUL WILLIAM JORDAN, Appellant.	)	

Appeal from the Superior Court of Maricopa County

(Cause No. CR-84940)

The Honorable Harold D. Martin, Judge

Affirmed

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GORDON, Justice:

Defendant Paul William Jordan appeals from a sentence of death after an aggravation/mitigation hearing pursuant to former A.R.S. §13-454.[1/] Defendant had previously been convicted of first-degree murder and sentenced to death, and this Court affirmed the judgment and sentence. State v. Jordan, 114 Ariz. 452, 561 P.2d 1224 (1976). Subsequent to our decision, the Supreme Court of the United States, in light of Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), vacated Jordan's death sentence and remanded to this Court. Jordan v. Arizona, 438 U.S. 911, 98 S.Ct. 3138, 57 L.Ed.2d 1157 (1978). On September 7, 1978, pursuant to State v. Watson, 120 Ariz. 441, 586 P.2d 1253 (1978), cert. denied, 440 U.S. 924, 99 S.Ct. 1254, 59 L.Ed.2d 478 (1979), we remanded to the trial court for resentencing. Defendant was again sentenced to death on December 20, 1978, after a hearing following the dictates of Lockett, supra, and Watson, supra. It is from this last sentence that defendant appeals. Taking jurisdiction pursuant to A.R.S. §13-4031, we affirm the sentence.

Defendant presents four basic claims on appeal:

(1) Arizona's death penalty statute is unconstitutional on its face.

(2) State v. Watson improperly permitted defendant to be resentenced to death after his first sentence was vacated.

(3) Defendant may not be sentenced to death, because his first degree murder conviction is based on a felony-murder theory.

(4) The death penalty statute was incorrectly applied to defendant.

CONSTITUTIONALITY OF THE DEATH PENALTY STATUTE

Defendant first claims that a sentence of death is per se cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution. We have previously found this claim to be without merit. See State v. Richmond, 114 Ariz. 186, 560 P.2d 41 (1976).

1/ Presently A.R.S. §13-703.

Defendant next contends that Arizona's death penalty statute violates due process of law because it offers no guidelines as to what mitigating circumstances may be considered and how they are to be weighed against the statutory aggravating circumstances. We have rejected this contention in State v. Mata, ___ Ariz. ___, 609 P.2d 48 (1980).

Defendant's last argument under this issue is that the Arizona death penalty statute is unconstitutional because it requires a defendant to prove the existence of mitigating circumstances and because it does not require the state to prove aggravating circumstances beyond a reasonable doubt. As to defendant's burden of proving mitigating circumstances, we have considered this issue and decided it adversely to defendant in State v. Watson, supra.

We have not previously considered the second prong of defendant's argument, that the death penalty statute is unconstitutional because it does not require the state to prove the existence of aggravating factors beyond a reasonable doubt. A.R.S. §13-454B provides that "[t]he burden of establishing the existence of any of the [aggravating] circumstances * * * is on the prosecution." The statute does not indicate the degree of certainty with which these circumstances must be established, but we have always assumed, and we so hold now, that the state must prove the existence of aggravating circumstances beyond a reasonable doubt. Our past cases, moreover, demonstrate that this Court will reduce a death penalty to life imprisonment where the evidence of aggravating factors is inconclusive. See, e.g., State v. Madsen, ___ Ariz. ___, ___ P.2d ___ (No. 4353, Filed March 26, 1980); State v. Verdugo, 112 Ariz. 288, 541 P.2d 388 (1975).

CHALLENGES TO STATE v. WATSON

Defendant sets forth a variety of arguments that this Court's decision in State v. Watson, supra, improperly allowed defendant to be resentenced after his first sentence was vacated. He asserts that Watson incorrectly decided that the unconstitutional parts of Arizona's death penalty procedure were severable from the remainder and that a Watson rehearing violates the double jeopardy and ex-post facto prohibitions of the Constitution. All of these contentions have been adequately considered in Watson and its accompanying supplement and we need only repeat our conclusion in Watson, that these claims are not meritorious.

Defendant also claims that our decision in Watson violates the general due process requirements of fundamental fairness. This argument appears to be no more than a restatement of his already rejected ex-post facto and double jeopardy arguments couched in broad terms of fairness. The crux of defendant's argument is that our decision in Watson was unfair because it had the effect of "changing the rules in the middle of the game," permitting the state to have a second chance to procure a death sentence. We do not find that Watson had an unfair effect on defendant. The "change in rules" was for defendant's benefit, allowing him to introduce any mitigating factors at the aggravation/mitigation hearing.

Defendant finally attacks the Watson decision as a judicially created penalty, unauthorized by law, and in violation of the Eighth and Fourteenth Amendments. This argument was rejected in State v. Mata, supra.

DEATH SENTENCE FOR FELONY-MURDER

Defendant has argued that the United States Supreme Court's decision in Lockett v. Ohio, supra, prohibits the death penalty where the defendant is convicted under a felony-murder theory. In State v. Arnett, ___ Ariz. ___, 608 P.2d 778 (1980) we said that Lockett did not prohibit the death sentence in a felony-murder case where the defendant intentionally shot the victim. See also State v. Steelman, ___ Ariz. ___, ___ P.2d ___ (No. 3299-2, Filed April 30, 1980).

PROPRIETY OF IMPOSING THE DEATH PENALTY ON DEFENDANT

At defendant's original sentencing hearing, the trial court found two aggravating circumstances based on defendant's four prior Texas convictions, and no mitigating circumstances. See State v. Jordan, 114 Ariz. 452, 561 P.2d 1224 (1976). The aggravating circumstances are found under A.R.S. §13-454E which provides:

> "1. The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.
>
> "2. The defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person."

At defendant's second sentencing hearing, the trial court found the same two aggravating circumstances and two additional aggravating circumstances

listed under A.R.S. §13-454E(5) and (6).[2/] The trial court again determined that no mitigating circumstances existed.

Initially defendant contends that the trial court was precluded from finding additional aggravating circumstances at his second sentencing hearing which were not found at his first hearing. Because we agree with the trial court's determination as to the existence of the first two aggravating circumstances and as to the absence of any mitigating circumstances, we find it unnecessary to consider the additional aggravating circumstances found at the second hearing, and we need not decide the merits of defendant's contention.

Defendant next asserts that the trial court misapplied A.R.S. §13-454E(1) and (2) in concluding that his Texas convictions were aggravating circumstances under the statute. Defendant argues that §13-454E(1) and (2) contemplate other convictions which occurred prior to the murder and, since his Texas convictions were entered after the murder, they are not aggravating circumstances.

We have recently held that A.R.S. §13-454E(1) and (2) is not a recidivist statute and that a conviction for another offense may be an aggravating circumstance even if both the offense and conviction occur after the murder which is being punished. State v. Steelman, supra. It follows that defendant's Texas convictions, which occurred after the murder, may be considered as aggravating circumstances at a sentencing hearing held subsequent to those convictions.

Defendant cites State v. Lopez, 120 Ariz. 607, 587 P.2d 1184 (1978), as holding that a conviction for another offense must occur prior to the commission of the murder in order to be treated as an aggravating circumstance. We do not believe that our holdings in Lopez and Steelman are inconsistent. In Lopez the issue was the time that a conviction is deemed to occur under former A.R.S. §13-1694A which provided:

2/ These aggravating circumstances are as follows:

"5. The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.

"6. The defendant committed the offense in an especially heinous, cruel, or depraved manner."

"A person who, having been previously convicted for petty theft, receiving stolen property, shoplifting, contributing to the delinquency of a minor, an offense involving lewd or lascivious conduct, or for any offense punishable by imprisonment in the state prison, commits any crime after such conviction, shall be punished upon conviction of such subsequent offense as follows: * * *."

We held that a conviction occurs at the time judgment of conviction is entered. The issue in the instant case is not when a conviction is deemed to occur, but whether that occurrence must precede the commission of the murder. The statute in Lopez by its terms contemplated convictions which were entered prior to the commission of the offense being punished. A.R.S. §13-454E(1) and (2) is not limited to such prior offenses. State v. Steelman, supra. We, therefore, hold that A.R.S. §13-454E(1) and (2) was not misapplied to defendant's Texas convictions.

Defendant also claims that his four prior convictions are not final because they are all being collaterally attacked by means of petitions for federal writs of habeas corpus. We have said that a prior conviction is a verity until set aside, and it may be used to enhance a sentence even though an appeal is pending. State v. Court of Appeals, Division I, 103 Ariz. 315, 441 P.2d 544 (1968). See also People v. District Court In & For the Twentieth Judicial District, 191 Colo. 558, 554 P.2d 1105 (1976). Although we recognize that an invalid prior conviction may not be used to form the basis of an aggravating circumstance for purposes of applying the death penalty, See State v. Steelman, supra; State v. Watson, supra; State v. Lee, 114 Ariz. 101, 559 P.2d 657 (1976), defendant has not attacked the validity of his prior convictions in this case by presenting specific claims of constitutional error. We thus conclude that the trial court correctly considered defendant's Texas convictions as aggravating circumstances.

Obviously, because this is a death penalty case, defendant's sentence should not be executed as long as none of the pending collateral proceedings have been finally decided adversely to defendant.[3/] If this situation still exists at the time

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3/ We note that if even one prior conviction is finally held to be valid in the pending collateral proceedings, defendant's death sentence must stand in the absence of any mitigating circumstances. A.R.S. §13-454D. We also note that the denial of one of defendant's habeas corpus petitions has been affirmed by the Court of Appeals for the Fifth Circuit. Jordan v. State of Texas, 592 F.2d 1188 (5th Cir. 1979).

defendant has exhausted all avenues of relief from his conviction and sentence in the case at bar, he may then seek a stay of execution based on the lack of finality of his prior convictions.

Defendant next contends that the trial court incorrectly found that there were no mitigating circumstances. Citing Lockett v. Ohio, supra, defendant asserts that a lack of specific intent to cause death must be considered as a mitigating circumstance, and he claims that there was no evidence of his specific intent to kill the victim. We do not believe that the evidence demonstrated defendant's lack of specific intent to cause death.

Traditionally, the term "intent" has encompassed more than a desire or purpose to achieve a specific result. Generally, when a defendant acts with the knowledge that his behavior is substantially likely to cause a result he is considered to intend that result. See LaFave & Scott, Criminal Law, § 28 at 196-197 (1972). The following portion of defendant's confession, introduced at trial, shows his specific intent to cause death:

> "Q. [By a police officer] Could you tell me what your approach was when you went into the store?
>
> "A. [By defendant] I went in and ordered a pack of cigarettes.
>
> "Q. Then what happened?
>
> "A. And when I went to pay in there I seen he [sic] quite a bit of money in the register.
>
> "Q. [sic] And I went and drew my pistol and drew down on him, walked behind the counter, register and he went for his pocket, and there was a bulge in his pocket and I thought he has a pistol. I shot him.
>
> "Q. Did you shot [sic] him right there behind the counter?
>
> "A. Behind the counter.
>
> "Q. Where do you think you shot him?
>
> "A. In the stomach."

It is clear from the above statements that defendant intended to shoot the victim, and it is reasonable to conclude, in the absence of any evidence to the contrary, that one who intentionally shoots another in a vital part of the body

either had the purpose of causing death or had the substantial knowledge that death would result. Cf. State v. Brierly, 109 Ariz. 310, 509 P.2d 203 (1973). Defendant, who had the burden of proving mitigating circumstances under A.R.S. §13-454B, offered no evidence to contradict the natural inference from his act. Defendant points out that there was no evidence that he knew the victim or that he intended to kill at the time he entered the store. This however, merely shows a lack of premeditation rather than absence of specific intent to kill.

Defendant argues that "[t]he jury was given a felony-murder instruction and so there is no jury verdict that would support a finding of specific intent." Defendant correctly notes that the felony-murder doctrine does not require a specific intent to kill to support a first degree murder conviction. See State v. Ferrari, 112 Ariz. 324, 541 P.2d 921 (1975). Lockett, supra, was not concerned, however, with the findings of the trier of fact during the guilt determination process of trial. Lockett merely mandates that the trial judge, at the sentencing stage, not be precluded from considering defendant's lack of specific intent as a mitigating circumstance. We do not believe that defendant proved his lack of specific intent to cause death, and the trial court did not err in finding that this mitigating circumstance was not present.

Defendant next contends that the trial court erroneously failed to consider his cooperation with state authorities as a mitigating circumstance. This cooperation consisted of a confession to police and a waiver of a hearing on his extradition from Texas to Arizona. We agree with the trial court's finding that defendant's cooperation did not amount to a mitigating circumstance.

At his sentencing hearing, defendant introduced a Tempe Police Department report which included his confession and the circumstances surrounding it. According to the report, Arizona police first became aware of defendant as a suspect in the murder when Texas authorities telephoned them and told them that a confidential informant in Texas had implicated defendant and another man in the robbery murder. Arizona police went to Texas and interviewed defendant, who at first denied any knowledge of the crime.

Later defendant attempted to bargain with authorities for his confession. Initially he demanded that various pending Texas robbery charges be dropped in return for his confession. He finally agreed to make a statement after he was told

that certain charges against his girlfriend, Nancy Willifred[4/] would be dropped. It is clear that defendant's confession was not motivated by a desire to help police. Rather, defendant attempted to use his confession as a bargaining chip with authorities. Indeed, we have previously upheld the voluntariness of defendant's confession because it was defendant who initiated the bargaining with police. See State v. Jordan, 114 Ariz. 452, 561 P.2d 1224 (1976). We do not believe that the circumstances of defendant's confession demonstrate a degree of cooperation with police which "mitigate[s] against imposing capital punishment." Gregg v. Georgia, 428 U.S. 153, 197, 96 S.Ct. 2909, 2936, 49 L.Ed.2d 859, 888 (1976).

We find nothing in the bare fact that defendant waived an extradition hearing to create a mitigating circumstance. Defendant has produced no evidence of his motivation, nor has he even alleged that extradition would not have occurred without his waiver. The extent of defendant's cooperation with State authorities was not a mitigating circumstance.

Finally, defendant claims that the trial court incorrectly found that his consumption of drugs and alcohol was not a mitigating factor. The only evidence of defendant's intoxication was the testimony of Nancy Willifred at the aggravation/mitigation hearing.

Willifred testified that she and defendant traveled together from Texas to the Phoenix area. Willifred described defendant's daily drinking and pill taking during the time period leading up to and including the day of the crime.

Willifred stated that defendant drank "quite a bit" of wine, at least two bottles daily, and took varying amounts of pills, both "downers" and "speed." She testified that defendant would first start drinking and taking drugs after lunchtime, and by evening he would be "drunk and goofy." Willifred also said that during the time they were in the Phoenix area, defendant drank more wine than usual, and she and defendant together consumed about eight or nine bottles daily.

When Willifred was asked about defendant's intoxication at the time of the crime, her answers were less precise. She said that she was not with defendant at

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4/ The police report lists Nancy Willifred as Nancy Caldwell. She testified at defendant's sentencing hearing under the name of Willifred and stated that she was the same person known as Nancy Caldwell.

the time of the crime and that she last saw him that day between four and five o'clock in the afternoon. According to the police report, the crime was committed between about 5:45 and 6:45 p.m. Willifred said that defendant had not been drinking too much that day but had been taking more pills. Defendant was "mumbling" when he left her.

The fact that defendant was to some degree intoxicated is not, by itself, a mitigating circumstance. Whether defendant's intoxication is a mitigating circumstance depends on whether "[h]is capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution." A.R.S. §13-454F(1)[5/].

Willifred's testimony falls short of proving the necessary degree of impairment from intoxication. Not only is her testimony inexact as to defendant's level of intoxication at the time of the crime, it is also devoid of any description of how defendant's intoxication affected his conduct, other than that he was "mumbling." Defendant did not mention the influence of drugs or alcohol in his confession, nor did he testify at his sentencing hearing. We agree with the trial court that defendant has failed to prove that his intoxication was a mitigating circumstance.

Because two aggravating circumstances exist and no mitigating circumstances are present, the sentence is affirmed.

FRANK X. GORDON, JR.
Justice

5/ Defendant says that intoxication was not available as one of the mitigating circumstances expressly listed in the statute. Arguably A.R.S. §13-454F(1) would cover intoxication, although we have indicated in an earlier case that only mental disorders were intended as impairments. See State v. Richmond, 114 Ariz. 186, 560 P.2d 41 (1976). In any case, after our decision in State v. Watson, 120 Ariz. 441, 586 P.2d 1253 (1978), cert. denied, 440 U.S. 924 (1979), in which we held that all mitigating circumstances must be considered, intoxication must now be included as a form of impairment.

CONCURRING:

FRED C. STRUCKMEYER, JR.
Chief Justice

WILLIAM A. HOLOHAN
Vice Chief Justice

JACK D. H. HAYS
Justice

JAMES DUKE CAMERON
Justice

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

ORIGINAL COPY

PAUL WILLIAM JORDAN,

Petitioner,

-vs-

STATE OF ARIZONA,

Respondent.

ON WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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586 P.2d 1253 (1979) 1,2

United States v. Jackson
390 U.S. 570
88 S.Ct. 1209
20 L.Ed.2d 138 (1968)

Woodson v. North Carolina
428 U.S. 280
(1976)

Zucht v. King
260 U.S. 174
(1922)

AUTHORITIES

Ariz.Rev.Stat.Ann. 1,2,3,4,12
§ 13-454
§ 13-454(E)(1)
§ 13-454(E)(2)
§ 13-454(E)(5)
§ 13-454(E)(6)

Laws 1973
Chapter 138
§ 10

United States Constitution
Fifth Amendment
Sixth Amendment 1,
Eighth Amendment
Fourteenth Amendment

QUESTIONS PRESENTED

I. DID THIS COURT'S ORDER VACATING PETITIONER'S DEATH SENTENCE AND REMANDING THE CASE FOR FURTHER PROCEEDINGS IN LIGHT OF LOCKETT V. OHIO, 438 U.S. 586 (1978), PRECLUDE THE ARIZONA COURT FROM RESENTENCING APPELLANT?

II. PETITIONER WAS TWICE SENTENCED TO DEATH UNDER THE PROCEDURES OF ARIZ.REV.STAT.ANN. § 13-454. A PORTION OF THE STATUTE WAS FOUND UNCONSTITUTIONAL AND SEVERED. MAY PETITIONER BE RESENTENCED UNDER THE JUDICIALLY CORRECTED STATUTE WITHOUT VIOLATION OF THE EIGHTH AMENDMENT, THE FOURTEENTH AMENDMENT DUE PROCESS CLAUSE, AND THE DOUBLE JEOPARDY AND EX POST FACTO GUARANTEES OF THE UNITED STATES CONSTITUTION?

III.(a) IS A SENTENCE OF DEATH CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGHTH AMENDMENT, FOR A CONVICTION UNDER FELONY-MURDER JURY INSTRUCTIONS WHERE THERE IS SUBSTANTIAL EVIDENCE THAT THE ACCUSED COMMITTED THE MURDER INTENTIONALLY?

III.(b) IS IT AN IMPROPER ALLOCATION OF THE BURDEN OF PROOF TO REQUIRE PETITIONER TO ESTABLISH THE EXISTENCE OF MITIGATING CIRCUMSTANCES?

IV.(a) DOES IT AMOUNT TO FREAKISH APPLICATION OF THE DEATH PENALTY TO PERMIT USE OF CONVICTIONS, WHICH OCCURRED AFTER COMMISSION OF THE HOMICIDE, AS AGGRAVATING CIRCUMSTANCES?

IV.(b) DO THE ARIZONA COURTS GENERALLY REFUSE TO CONSIDER MITIGATING CIRCUMSTANCES, USE THE WATSON CASE AS A FRAUD ON THE FEDERAL COURTS, AND APPLY THE DEATH PENALTY ARBITRARILY, CAPRICIOUSLY, AND FREAKISHLY?

IV.(c) DID THE COURT ERR IN REFUSING TO FIND THE EXISTENCE OF MITIGATING CIRCUMSTANCES IN PETITIONER'S CASE?

STATEMENT OF THE CASE

On January 15, 1974, petitioner robbed a grocery store and killed the proprietor. He was convicted of murder in the first degree and sentenced to death. The Arizona Supreme Court affirmed the judgment and sentence. State v. Jordan, 114 Ariz. 452, 561 P.2d 1224 (1976).

This Court subsequently issued its opinion in Lockett v. Ohio, 438 U.S. 586 (1978). The same date, this Court granted petitioner's first petition for writ of certiorari, vacated the sentence of death, and remanded the case for further proceedings in light of Lockett v. Ohio. Jordan v. Arizona, 438 U.S. 911 (1978).

On September 7, 1978, the Arizona Supreme Court, pursuant to State v. Watson, 120 Ariz. 441, 586 P.2d 1253 (1978), cert. denied, 440 U.S. 924 (1979), and Ariz.Rev.Stat.Ann. § 13-454 (1973), ordered that the case be remanded to the trial court "for sentencing after a new aggravation-mitigation hearing." That hearing was held on December 15, 1978. At the hearing, petitioner presented as mitigation, one witness and 7 exhibits. He sought to show that he had cooperated with the police, that he had no intent to kill, and that he was influenced by drugs and alcohol. The 7 exhibits introduced were police reports, petitioner's confession to the murder, and various pleadings and documents pertaining to the case. The one witness was petitioner's girl friend. She had been with him in Phoenix at the time of the murder, and had traveled with him afterwards. She testified to his alcohol and drug habits while she knew him, and on the day of the murder. (R.T. of Dec. 15, 1978, at 9-17, 27-31.)

In addition to the testimony and exhibits, petitioner argued to the trial court that the aggravation found at the

initial sentencing in 1974 was faulty. This probably was thought necessary because of the court's order for a "new aggravation-mitigation hearing." His contention was that the Texas robbery convictions used to satisfy subsections (E)(1) and (E)(2) of Ariz.Rev.Stat.Ann. § 13-454 were not "prior" convictions because they occurred after January 15, 1974, the date of the murder. (R.T. of Dec. 15, 1978, at 37-38.) Petitioner also argued in regard to aggravation that the murder was not heinous and cruel within Ariz.Rev.Stat.Ann. § 13-454(E)(6). (R.T. of Dec. 15, 1978, at 35-36.)

At the conclusion of the "new aggravation-mitigation hearing," the trial court found the following aggravating factors: (1) under § 13-454(E)(1), petitioner had 4 prior robbery convictions in Texas; (2) under § 13-454(E)(2), petitioner had the same 4 prior robbery convictions in Texas; (3) under § 13-454(E)(5), taking the money in the robbery was the receipt by appellant of something of pecuniary value; and (4) under § 13-454(E)(6), the murder was heinous and cruel. No mitigation was found and, again, a penalty of death was imposed. (R.T. of Dec. 20, 1978, at 8-9, 14.) The Arizona Supreme Court affirmed the judgment and sentence, based on the first two aggravating circumstances, finding it unnecessary to consider the additional aggravating circumstances found at the second hearing. State v. Jordan, ___ Ariz. ___, 614 P.2d 825 (1980).

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ARGUMENT

I

RESENTENCING PETITIONER AFTER THIS COURT REMANDED THE CASE FOR FURTHER PROCEEDINGS IN LIGHT OF LOCKETT V. OHIO DOES NOT VIOLATE THE MANDATES OF THIS COURT.

Petitioner contends that resentencing him to death violates the mandate of this Court, which vacated the original sentence of death. (Petitioner's Question Presented No. I.) He claims that the order of this Court did not authorize a resentencing. However, the order of the Court remanded the case "for further proceedings" in light of Lockett v. Ohio, supra. Clearly, the sentence of death was vacated because, due to Arizona's procedure at the time, petitioner was limited in what he could offer in mitigation. The Arizona Supreme Court did nothing to violate the mandate of this Court in ordering a new sentencing hearing conforming to the Lockett requirements. The fact that other jurisdictions were not able to interpret their statutes to permit such a resentencing, and were, therefore, forced to commute death sentences, does not mean Arizona has failed to scrupulously carry out this Court's order.

ARGUMENT

II

THERE BEING NO TRUE CONFLICT AMONG COURTS, NO DOUBLE JEOPARDY SITUATION, NO EX POST FACTO VIOLATION, AND A VALID SEVERANCE OF THE STATUTE, PETITIONER PRESENTS NO SUBSTANTIAL CHALLENGE TO THE SENTENCING PROCEDURES UTILIZED.

A. The Arizona Court properly severed subsection F of Ariz.Rev.Stat.Ann. § 13-454 (1973).

In Richmond v. Cardwell, 450 F.Supp. 519 (D.Ariz. 1978), the court held that, because Arizona's death penalty statute was too restrictive in terms of the mitigating

circumstances that the trial court could consider, the statute was invalid to that extent. Later that year, the Arizona Supreme Court held that the constitutional and unconstitutional portions of Arizona's death penalty statute were severable, and that the constitutional portion remained in full force and effect. State v. Watson, 120 Ariz. 441, 445, 586 P.2d 1253, 1257 (1978), cert. denied, 440 U.S. 924 (1979). The Watson Court then remanded the case for resentencing in order to give Watson the opportunity to present any evidence in mitigation. (Id.)

Petitioner assails the Arizona Supreme Court's action as a judicial "rewriting" of the statute. Petitioner fails to note that, when the Arizona Legislature did amend the statute on May 1, 1979, it amended it in a fashion that was wholly consistent with the Arizona Supreme Court's language and holding in Watson. In any event, the Arizona Supreme Court correctly held that the statute was severable. In United States v. Jackson, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968), this Court held that the Federal Kidnapping Act was not entirely invalid merely because the punishment clause violated the Fifth and Sixth Amendments to the United States Constitution. In so holding, this Court reiterated the following language employed in Champlin Refining Co. v. Corporation Commission, 286 U.S. 210, 52 S.Ct. 559, 76 L.Ed.2d 1062 (1932):

> Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.

286 U.S. at 234. The Jackson Court went on to note as follows:

> The clause in question is a functionally independent part of the Federal Kidnapping

> Act. Its elimination in no way alters the substantive reach of the statute and leaves completely unchanged its basic operation. Under such circumstances, it is quite inconceivable that the Congress which decided to authorize capital punishment in aggravating kidnapping cases would have chosen to disgard the entire statute if informed that it could not include the death penalty clause now before us.

390 U.S. at 586. Similarly, there is no reason to believe that the Arizona Legislature would have done away with Arizona's death penalty if it had known that the original penalty provision was invalid. The Arizona Supreme Court properly held that the statute was severable. See also Buckley v. Valeo, 424 U.S. 1, 109, 96 S.Ct. 612, 677, 46 L.Ed.2d 659, 739 (1976); Harrison v. NAACP, 360 U.S. 167, 178, 79 S.Ct. 1025, 1031, 3 L.Ed.2d 1152, 1159 (1959).

B. Petitioner's constitutional protections against ex post facto laws and double jeopardy have not been violated.

On the basis of chapter 138, § 10, Laws 1973, petitioner argues that he has twice been placed in jeopardy. The provision relied on by petitioner states as follows:

> In the event the death penalty is held to be unconstitutional on final appeal, a person convicted of first degree murder or another offense punishable by death who has been sentenced to die shall be resentenced by the sentencing court to life imprisonment without possibility of parole until the person has served a minimum of 25 calendar years.

Petitioner's analysis does not take into account the fact that the death penalty itself has not been held unconstitutional. The single flaw discovered in Arizona's death penalty statute was a limitation on the factors which a defendant could introduce in mitigation of the death penalty. Once petitioner's "severability" argument is rejected, as the aforementioned authorities suggest it

should be, his double jeopardy claim has no merit. Section 10 never came into play, and thus petitioner did not "receive a life sentence by operation of law." Petitioner was sentenced to death under a statute that passed constitutional muster except with respect to one aspect of the penalty clause. That clause was severable from the remainder of the statute. Petitioner was then given the opportunity to present any and all circumstances in mitigation of his offenses. He was again sentenced to death. Although petitioner's argument might have merit if the entire statute, or at least a non-severable portion of the statute, had been declared unconstitutional, the argument has no merit under these circumstances. It is clear that, despite the unconstitutional limitation on mitigation evidence (which was severed), there was a death penalty "in effect" when petitioner was sentenced, so a rehearing in which a death sentence may again be imposed envisions no new, different or harsher penalty than the one petitioner faced from the beginning. Dobbert v. Florida, 432 U.S. 282 (1977); Ex parte Lange, 85 U.S. (18 Wall.) 163, 21 L.Ed. 872 (1873). Hence, the prohibition against ex post facto actions does not apply.

Furthermore, because the sentence imposed upon petitioner has never been anything other than death, his argument that the sentence violates the ex post facto clause, or in the alternative, the due process clause of the Fourteenth Amendment, must fail.

Petitioner's argument that there is a conflict among the states regarding application of Dobbert v. Florida, supra, is nothing more than an alternative argument on the ex post facto and double jeopardy issues. There is actually no conflict among the jurisdictions. The reason Dobbert applies in some jurisdictions and not others is

obviously due to differences in the various death penalty statutes.

In sum, there is no true conflict in decisions between state courts, no double jeopardy problem, and no ex post facto violation. There is no substantial reason for granting certiorari on these issues. (Petitioner's Question Presented No. II.)

C. The question of the constitutionality of State v. Watson has been decided adversely to petitioner by the federal district court, and is presently pending on appeal in the Ninth circuit.

On April 18, 1980, the federal district court entered its opinion upholding the constitutionality of the decision in Watson. Knapp v. Cardwell, No. CIV. 78-385 PHX. (CAM) (D.Ariz., Apr. 18, 1980). This case is a class action involving petitioner and the other 29 inmates presently on death row.[1] The decision by the federal district court has been appealed, and is presently pending before the Ninth Circuit Court of Appeals. Knapp v. Cardwell, No. 80-5419 (9th Cir., filed May 10, 1980). Respondent submits that, if this Court should want to review the Watson decision, it would be more advantageous to do so after the Ninth Circuit issues its opinion.

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1. Included in this group of 30 inmates are Luis Mata and Willie Luther Steelman, who have petitions for certiorari pending. Mata v. Arizona, No. 80-5228; Steelman v. Arizona, No. 80-5252. Also included are Larry Eugene Evans and Paris Carriger, whose petitions for certiorari were denied by this Court. Evans v. Arizona, No. 79-6752 (U.S., Oct. 6, 1980); Carriger v. Arizona, 444 U.S. 1049 (1980).

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ARGUMENT

III

PETITIONER'S ISSUES ON CRUEL AND UNUSUAL PUNISHMENT, BURDEN OF PROOF, AND THE DEATH SENTENCE IN FELONY-MURDER CASES, WARRANT NO REVIEW, HAVING BEEN FORECLOSED BY PRIOR DECISIONS OF THIS COURT.

This Court has made it abundantly clear that it will not waste its time reviewing cases which are clearly disposed of by its previous decisions. See, e.g., Zucht v. King, 260 U.S. 174 (1922); Palmer Oil Corp. v. Amerada Petroleum Corp., 343 U.S. 390 (1952). Here Petitioner raises an issue of the burden of proof being placed upon him at sentencing to demonstrate mitigating circumstances sufficient to render the death penalty inappropriate once death becomes an available option because an aggravating factor has been proved. (Petitioner's Question Presented No. III.C.) However, this Court has held that a burden of proof may be allocated to the defendant, even at the guilt-innocence stage. Patterson v. New York, 432 U.S. 197 (1977) (proof of affirmative defense). Under the Arizona death penalty statute, the defendant has the burden of showing anything only at the sentencing stage, after guilt has been determined, and only where an aggravating circumstance has been established. The principle established in Patterson clearly governs here, and so granting certiorari on the Petitioner's Question Presented No. III.C. would appear a poor exercise of judicial economy.

The application of the "preclusion by prior decision" rule is even more obvious with regard to the contention that the death penalty amounts to cruel and unusual punishment in violation of the Eight Amendment. (Petitioner's Question Presented No. III.A.) This Court has held that the death penalty is not per se cruel and

unusual punishment. Gregg v. Georgia, 428 U.S. 153 (1976). While the Eighth Amendment prevents imposition of punishments unauthorized by statute, the death penalty is authorized by valid Arizona statute. (See Argument II.) Having spoken directly to the issue, this Court need not address it again.

The question of applying the death penalty in a felony murder case (Petitioner's Question Presented No. IV) seems also to have been foreclosed by the various decisions in Lockett v. Ohio, supra. Justice Rehnquist flatly rejected the proportionalilty analysis utilized by Justice White. The plurality opinion, joined in by Justices Burger, Stewart, Powell, and Stevens, required only that all circumstances of the offense must be open to examination as mitigating factors. There was never any suggestion that death could not be imposed simply because the case was tried under a felony-murder rule. Justice Blackmun likewise demanded only that the defendant's degree of participation be a mitigating factor available for consideration in sentencing. That is precisely what was required by the Arizona statute, which included the following as specified mitigating factors, even before the Arizona Supreme Court severed the limitations on mitigation evidence:

> 3. He was a principal, under § 13-452, Arizona Revised Statutes, in the offense, which was committed by another, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution.
>
> 4. He could not reasonably have foreseen that his conduct in the course of the commission of the offense for which he was convicted would cause, or would create a grave risk of causing, death to another person.

Ariz.Rev.Stat.Ann. § 13-454(F). See also Richmond v. Cardwell, 450 F.Supp. 519 (D.Ariz. 1978).

Therefore, the proceedings in petitioner's case fully complied with the standards set out in Lockett, and further

review is unnecessary. Should this Court feel that some amplification of Lockett is in order, this case would not seem to be an appropriate vehicle. When appellant confessed to the crime, he admitted that while he was taking money from the cash register the victim "looked like he was going for a pistol and I pulled out mine and shot him." Petitioner thus has little standing to argue that he will be unjustly victimized by a felony-murder statute. That he may have been convicted under felony-murder instructions is irrelevant to the fact that there was ample evidence before the sentencing authority to establish his actual, intentional commission of the murder. This was a "felony murder" only in the sense that the murder was joined to another felony; it was not an instance of an unintentional death occurring during a non-homicidal crime. No grant of certiorari is appropriate on these purported issues.

ARGUMENT

IV

THE DEATH PENALTY WAS NOT FREAKISHLY OR ARBITRARILY APPLIED; THE COURT PROPERLY FOUND THE EXISTENCE OF AGGRAVATING CIRCUMSTANCES AND NO MITIGATING CIRCUMSTANCES; THE WATSON DECISION IS NOT A FRAUD ON THE FEDERAL COURTS.

A. Aggravating Circumstances

Two of the aggravating circumstances found by the trial court and upheld by the Arizona Supreme Court were petitioner's four convictions for robbery in Texas in 1974. The murder which is the subject of this petition occurred January 15, 1974. Although the Texas crimes took place before January 15, 1974, the convictions for them were not obtained until a few months after that date. Petitioner argues that, because the robbery convictions followed the murder, and he was tried in

Texas before being tried in Arizona, the convictions cannot be aggravating circumstances.

Ariz.Rev.Stat.Ann. § 13-454 was drafted in response to the call of the United States Supreme Court in Furman v. Georgia, 408 U.S. 238 (1972), for a death penalty sentencing scheme that would focus and guide the consideration of the sentencing authority to those relevant factors of mitigation and aggravation that would ensure the reliability of a death penalty determination. Section 13-454 was not intended to freeze aggravation and mitigation at the time of the offense. That would be inimical to those things the statutory scheme was designed to achieve. If the purpose of the sentencing procedure is to guide and focus the trial court's consideration of the particularized circumstances of the individual offense and the individual offender, his character and propensities, the trial court must have the fullest information concerning the crime and the defendant's life and characteristics. See Lockett v. Ohio, supra, 438 U.S. at 603; Jurek v. Texas, 428 U.S. 262, 274 (1976); Woodson v. North Carolina, 428 U.S. 280, 303-04 (1976). Limiting consideration to those things existing at the time of the offense would not permit the informed choice that is necessary.

Petitioner's claim that extradition and the order of occurrence of trial and conviction in different states is "purely arbitrary" and an "irrelevant occurrence" overlooks the fact that these are decisions made by prosecutors and extradition authorities. In Gregg v. Georgia, supra, this Court recognized the fact that there are many opportunities for discretionary actions by government agencies in processing a murder case, but that this alone does not violate the principles set out in Furman v. Georgia.

Gregg v. Georgia, supra, 428 U.S. at 199. Petitioner has not been the victim of arbitrary and freakish application of capital punishment for this reason.

B. Mitigating Circumstances

Petitioner claims the Arizona courts have refused to consider mitigating circumstances, that the "Watson opinion is a fraud meant solely to pass federal court review without changing the reality of application in Arizona," and that application of the death penalty in Arizona, therefore, is arbitrary and capricious. These allegations are without basis in fact.

Since enactment of Ariz.Rev.Stat.Ann. § 13-454, the appeals of 44 death row inmates have been filed in the Arizona Supreme Court. Of those, 1 is presently awaiting resentencing, 19 are pending final decision, and 10 have had their sentences affirmed by the Arizona Supreme Court. However, 14 have had their sentences set aside either by the Arizona Surpeme Court or in the trial court. See Appendix A. Since the Watson decision, in two instances the court set aside the death sentence, finding that the aggravating circumstance that the crime was cruel, heinous or depraved, was not proved by the state. State v. Madsen, 125 Ariz. 346, 609 P.2d 1046 (1980); State v. Lujan, 124 Ariz. 365, 604 P.2d 629 (1979). See also State v. Brookover, 124 Ariz. 38, 601 P.2d 1322 (1979). The court has twice found the mitigating circumstance was sufficiently substantial to call for leniency. State v. Brookover, supra; State v. Doss, 116 Ariz. 156, 568 P.2d 1054 (1977). Any suggestion that the Arizona courts act as nothing more than a rubber stamp approving the prosecutor's request for the death penalty in every instance is unwarranted, and petitioner's claim that the Watson decision is a fraud and that the death penalty in

Arizona is being applied freakishly is without merit.

In the case at hand, the Arizona court did not arbitrarily conclude the offered mitigating circumstances did not exist. At the resentencing petitioner offered three things in mitigation: (1) his cooperation with the police, (2) his lack of intent to kill, and (3) his use of drugs and alcohol on the day of the murder.

Petitioner can hardly be commended for confessing and cooperating with the police. It was not out of altruism that he confessed. He confessed for selfish reasons that had nothing to do with helping the police solve the crime. He bartered with the authorities: what he knew of the crime in return for the dropping of charges against his girl friend and her release from jail.

Petitioner argues that there was no direct evidence that he had an intent to kill. He also states the homicide occurred unexpectedly during the course of the robbery, and that he fired his gun thinking the victim was reaching for a gun. In his statement, petitioner told the police that, as the victim was taking the money from the cash register, he "looked like he was going for a pistol and I pulled out mine and shot him." This seems quite intentional, hardly mitigative.

Nancy Willifred, petitioner's girl friend, and the object of the barter for his confession, testified at the resentencing that, while in Phoenix around the time of the murder, petitioner used drugs and alcohol. (R.T. of Dec. 15, 1978.) She testified that, on the day of the murder, petitioner had not been drinking "too much that day," and "had been taking more pills that day." (R.T. of Dec. 15, 1978, at 29.) When she last saw petitioner, which she estimated to be 4:00 or 5:00 in the afternoon, he was mumbling. She had no knowledge of his condition at the time of the crime. (R.T. of Dec. 15, 1978, at

30.) The trial court found Ms. Willifred's testimony "incredible, contrived and unworthy of belief." (R.T. of Dec. 20, 1978, at 8.)

Contrary to petitioner's claims, this testimony does not show him to be heavily under the influence of alcohol and drugs at the time the homicide occurred. It deserves little more attention than the trial court gave it. It is also interesting to note that in his confession, petitioner did not mention drugs, alcohol, or the effect they may have had upon him at the time of the crime. Imposition of the death penalty was not freakish or arbitrary.

CONCLUSION

It is respectfully submitted that the petition for certiorari should be denied.

Respectfully submitted,

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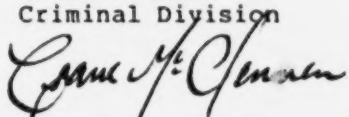

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APPENDIX A

DISPOSITION OF CAPITAL CASES FILED IN ARIZONA SUPREME COURT SINCE ENACTMENT OF ARIZ.REV.STAT.ANN. § 13-454

REDUCED TO LIFE BY ARIZONA SUPREME COURT -- AGGRAVATION NOT PROVED:

State v. Lee, 114 Ariz. 101, 559 P.2d 657 (1976)
State v. Lujan, 124 Ariz. 365, 604 P.2d 629 (1979)
State v. Madsen, 125 Ariz. 346, 609 P.2d 1046 (1980)
State v. Verdugo, 112 Ariz. 288, 541 P.2d 388 (1975)

REDUCED TO LIFE BY ARIZONA SUPREME COURT -- MITIGATION PROVED:

State v. Brookover, 124 Ariz. 38, 601 P.2d 1322 (1979)
State v. Doss, 116 Ariz. 156, 568 P.2d 1054 (1977)

RECEIVED LIFE IN TRIAL COURT AFTER REMAND:

State v. Edwards, 122 Ariz. 206, 594 P.2d 72 (1979)
State v. Mata (Alonzo), 125 Ariz. 243, 609 P.2d 58 (1980)
State v. Melendez, 121 Ariz. 1, 588 P.2d 294 (1978)
State v. Morales, 120 Ariz. 517, 587 P.2d 236 (1978)
State v. Rodriquez, ___ Ariz. ___, 612 P.2d 484 (1980)

CONVICTION REVERSED BY ARIZONA SUPREME COURT:

State v. Dunlap, 125 Ariz. 104, 608 P.2d 41 (1980)
State v. McDaniel, No. 4220 (Ariz.Sup.Ct., Sept. 11, 1980)
State v. Robison, 125 Ariz. 107, 608 P.2d 44 (1980)

AFFIRMED SENTENCE OF DEATH:

State v. Arnett, 125 Ariz. 201, 608 P.2d 778 (1980)
State v. Carriger, 123 Ariz. 335, 599 P.2d 788 (1979), cert. denied, 444 U.S. 1049 (1980)
State v. Ceja, ___ Ariz. ___, 612 P.2d 491 (1980)
State v. Clark, No. 4346 (Ariz.Sup.Ct., July 25, 1980)
State v. Evans, 124 Ariz. 526, 606 P.2d 16 (1980), cert. denied, No. 79-6752 (U.S., Oct. 6, 1980)
State v. Jordan, ___ Ariz. ___, 614 P.2d 825 (1980)
State v. Knapp, ___ Ariz. ___, 611 P.2d 90 (1979)
State v. Mata (Luis), 125 Ariz. 233, 609 P.2d 48 (1980)
State v. Smith (Sylvester), ___ Ariz. ___, 610 P.2d 46 (1980)
State v. Steelman, ___ Ariz. ___, 612 P.2d 475 (1980)

APPEAL ON RESENTENCING PENDING:

State v. Bishop, 118 Ariz. 263, 576 P.2d 122 (1978)
State v. Blazak, 114 Ariz. 199, 560 P.2d 54 (1977)
State v. Holsinger, 115 Ariz. 89, 563 P.2d 888 (1977)
State v. Richmond, 114 Ariz. 186, 560 P.2d 41 (1976)
State v. Smith (Joseph), 123 Ariz. 231, 599 P.2d 187 (1979)
State v. Valencia, 124 Ariz. 139, 602 P.2d 807 (1979)
State v. Watson, 120 Ariz. 441, 586 P.2d 1253, cert. denied, 440 U.S. 924 (1979)

REMANDED FOR RESENTENCING:

State v. Gretzler, ___ Ariz. ___, 612 P.2d 1023 (1980)

APPEAL PENDING -- NO PREVIOUS ARIZONA SUPREME COURT REVIEW:

State v. Britson, No. 4056
State v. Emery, No. 5001
State v. Greenawalt, No. 4611
State v. Jeffers, No. 4253
State v. McVay, No. 4604
State v. Ortiz, No. 4814
State v. Poland (Michael), No. 4970
State v. Poland (Patrick, No. 4969
State v. Schad, No. 4876
State v. Tison (Raymond), No. 4624
State v. Tison (Ricky), No. 4611
State v. Vickers, No. 4765

TOTAL AWAITING RESENTENCING:	1
TOTAL PENDING REVIEW:	19
TOTAL DEATH SENTENCE AFFIRMED:	10
TOTAL DEATH SENTENCE VACATED (ALL REASONS):	14
TOTAL	44